

Reviving the Right to Vote

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I. INTRODUCTION

Losers in partisan districting battles have long challenged the resulting districting plans under seemingly unrelated legal doctrines. They have filed lawsuits alleging malapportionment, racial gerrymandering, and racial vote dilution, and they periodically prevail.¹ Many election law scholars worry about these lawsuits, claiming that they needlessly “racialize” fundamentally political disputes, distort important legal doctrines designed for other purposes, and provide an inadequate remedy for a fundamentally distinct electoral problem.²

I am not convinced. This Article argues that the application of distinct doctrines to invalidate or diminish what are indisputably partisan gerrymanders is not necessarily problematic, and that the practice may well have salutary effects. The argument is premised both on the belief that the Court was right to reject the recent challenges to partisan gerrymandering as well as the conviction that a workable principle to restrain the practice awaits implementation.

This Article focuses on *LULAC v. Perry*,³ the most recent example of the sort of judicial decision about which election law scholars fret. Unable to articulate any constitutional problem with a blatant partisan gerrymander in Texas, the Supreme Court found traction under the Voting Rights Act (VRA) and held that a portion of that gerrymander diluted minority voting strength in the southwest portion of the state.⁴ More specifically, the Court held that Texas violated Section 2 of the Voting Rights Act when it displaced nearly 100,000 Latino residents from a congressional district in Laredo to protect the Republican incumbent they refused to support.⁵

Texas’ foray into “re-redistricting” was, of course, a patently partisan affair. Still, the state pursued its plan through race-based districting moves that relied on the close connection between race and party in Texas. In this

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¹ See, e.g., *League of United Latin Am. Citizens v. Perry*, 126 S. Ct. 2594, 2605 (2006) [hereinafter *LULAC*]; *Karcher v. Dagget*, 462 U.S. 725, 727 (1983); *Vieth v. Pennsylvania*, 195 F. Supp. 2d 672, 679 (M.D. Pa. 2002).

² See, e.g., Daniel R. Ortiz, *Cultural Compactness*, 105 MICH. L. REV. FIRST IMPRESSIONS 48, 49 (2006), <http://students.law.umich.edu/mlr/firstimpressions/vol105/ortiz.pdf>; Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 543, 569 (2004); Kathleen M. Sullivan & Pamela S. Karlan, *The Elysian Fields of the Law*, 57 STAN. L. REV. 695, 709–10 (2004).

³ 126 S. Ct. 2594 (2006).

⁴ *Id.* at 2623.

⁵ *Id.*

context, the resulting claims of race-based injury are hardly an ancillary distraction obscuring the core dispute, but, instead, a predictable consequence of the gerrymander itself.

As important, however, is the extent to which the Court's concern about partisan gerrymandering and, in particular, the relentless pursuit of incumbency protection, both propelled and shaped the race-based injury the Justices identified. *LULAC* viewed Laredo's Latino community as cohesive and discrete in the traditional sense, but also observed that the community was "politically active" and engaged. This political engagement existed because the district had been competitive prior to redistricting. In my view, it was this political engagement, made possible by a competitive forum, that, for the Court, ultimately made the political influence of Laredo's Latino voters worth protecting.

It is also what distinguished Latino voters in Laredo from African-American voters in Fort Worth. There, the Court let stand the dismantling of a so-called coalition district in which black voters comprising less than half the district's electorate claimed to control electoral outcomes.⁶ In Justice Kennedy's controlling view, the pervasive lack of competition in Fort Worth meant that meaningful voter preferences could neither be expressed nor ascertained, and thus that the state's dismantling of this district could not dilute minority voting strength in any measurable way.⁷ Because Fort Worth lacked the vibrancy manifest in Laredo, the state's decision to splinter the Fort Worth district caused no representational harm and thus was immune from attack under Section 2.⁸

By protecting Latino voters in Laredo but denying relief to black voters in Fort Worth, *LULAC* suggests that minority voters might have a protected right to participate in a competitive political environment but not in a non-competitive one. This suggestion, if the Court develops it, represents a dramatically new approach to minority voting rights, one that shifts Section 2's present focus on electoral outcomes to one directed at the electoral process itself. As such, it all but repudiates traditional efforts to insulate cohesive minority groups from political competition. If Section 2 no longer protected minority influence in noncompetitive districts, many fewer districting decisions would be subject to statutory challenge.

I am nevertheless inclined to welcome the move. Redefining the type of race-based community entitled to statutory protection enabled a Court long wary of Section 2 to identify for the first time at least one race-based community that warrants statutory protection.⁹ By so doing, the Court

⁶ *Id.* at 2626.

⁷ *Id.* at 2625.

⁸ *Id.*

⁹ See Ellen D. Katz, *From Laredo to Fort Worth: Race, Politics, and the Texas Redistricting Case*, 105 MICH. L. REV. FIRST IMPRESSIONS 38, 38 (2006), <http://students.law.umich.edu/mlr/firstimpressions/vol105/katz.pdf>.

necessarily acknowledged that race need not be a problem to overcome but can be a trait that unites people in positive ways and gives rise to communities of value. That is hardly an inconsequential acknowledgement given how often the Court has invalidated state efforts to create and foster racially-defined political communities.¹⁰ And it is an acknowledgement that takes on added importance now that substantial challenges are pending to the validity of the renewed VRA,¹¹ and principled ones remain possible against Section 2 itself.¹²

As a normative matter, moreover, making racial vote dilution contingent on competitive elections might just be a constructive development. Racial vote dilution has traditionally been remedied (or avoided) through the creation of a majority-minority district. These invariably safe Democratic districts have been the subject of much criticism, some celebration, and a sustained debate as to their value as vehicles for minority political representation.¹³ And yet, neither Congress nor the Supreme Court ever meant for the majority-minority district to be the exclusive or even the preferred remedy for racial vote dilution under Section 2.¹⁴ *Thornburg v. Gingles*, the authority often cited for the contrary proposition, held only that the failure to create such a district in specified circumstances informs the question of liability under Section 2.¹⁵ *Gingles* said nothing about how violations of Section 2 might be remedied.

To be sure, the majority-minority district offers a remedy for racial vote dilution. It allows for minority influence when voting is racially polarized, and, as some studies suggest, provides a venue that itself erodes racial polarization among voters.¹⁶ But because a majority-minority district is also invariably a noncompetitive district, it offers a form of political participation

¹⁰ See, e.g., *Rice v. Cayetano*, 528 U.S. 495, 499 (2000); *Miller v. Johnson*, 515 U.S. 900, 927–28 (1995). *LULAC v. Perry* did so as well. See *LULAC*, 126 S. Ct. at 2619 (regarding District 25).

¹¹ See Complaint at 5, *Nw. Austin Mun. Util. Dist. No. 1 v. Gonzales*, No. 1:06-cv-01384-PLF (D.D.C. Aug. 8, 2006).

¹² See, e.g., Ellen D. Katz, *Reinforcing Representation: Congressional Power to Enforce the Fourteenth and Fifteenth Amendments in the Rehnquist and Waite Courts*, 101 MICH. L. REV. 2341, 2403–05 (2003).

¹³ See, e.g., SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 832–33 (2d rev. ed. 2001).

¹⁴ The 2006 renewal of the Voting Rights Act adds language to Section 5 meant to require the maintenance of such districts as a means to avoid retrogression, but left Section 2 unchanged. See Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 5(3), 120 Stat. 577, 580–81 (2006).

¹⁵ *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986).

¹⁶ See, e.g., DAVID T. CANON, *RACE, REDISTRICTING, AND REPRESENTATION: THE UNINTENDED CONSEQUENCES OF BLACK MAJORITY DISTRICTS* 204–05, 261 (1999).

(as related to but ultimately distinct from the form of political representation) about which we should be wary, particularly when the absence of competition seeps into the primary itself.

A competitive process vests in every voter the potential to be the coveted swing voter, the one whose support candidates most seek, the one for whom they modify policy proposals and offer the political spoils that generate loyalty.¹⁷ A competitive electoral district helps overcome traditional barriers to minority political participation by giving candidates reason to court minority voters. Such a district, be it single or multi-member,¹⁸ accordingly holds promise as a means to destabilize racial bloc voting. It offers an attractive alternative to the majority-minority district as a means to remedy racial vote dilution. After all, minority voters might just be best served by a political arena in which politicians actually vie for their votes.

But so would all of us.¹⁹ *LULAC*'s suggestion that competition gives rise to political participation worth protecting under Section 2 invites articulation of a broader principle: namely, that the right to vote must encompass something more than the ability to cast a ballot for a preordained victor. In *LULAC* and other cases, the Court appropriately pushed back challenges brought by partisan losers claiming entitlement to a greater share of the districting spoils. *LULAC*'s Section 2 analysis, however, offers something more workable and more palatable. The decision rests on a nascent conception of political harm experienced by all voters—regardless of race—when a political system is rigged to block competition.

II. REDEFINING RACIAL VOTE DILUTION

Section 2 of the VRA is a difficult statutory provision. Thirteen related but distinct factors presently inform its application, with no single factor carrying dispositive weight, and several requiring a host of subsidiary findings.²⁰ An absence of discriminatory intent does not ensure statutory

¹⁷ Ellen D. Katz, *Resurrecting the White Primary*, 153 U. PA. L. REV. 325, 325–26 (2004).

¹⁸ Such districts could be single or multi-member, so long as the latter operate without the accompanying features (i.e., anti-single shot, majority vote, and numbered place requirements) that historically eliminated minority influence in at-large systems. See generally Chandler Davidson, *The Recent Evolution of Voting Rights Law Affecting Racial and Language Minorities*, in *QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965–1990* 21 (Chandler Davidson & Bernard Grofman eds., 1994).

¹⁹ But see Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 650 (2002) (challenging notion that noncompetitive districts are problematic).

²⁰ See S. REP. NO. 97-417, at 28–29 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 206–07 (listing seven factors plus two additional concerns that bear on the inquiry); *Johnson v. DeGrandy*, 512 U.S. 997, 1000 (1993) (articulating concept of proportionality

compliance, nor does the provision of unimpeded access to the ballot box. Equality of opportunity to participate in the political process is promised, but whatever that means, it explicitly does not encompass a right to proportional representation.²¹

Compounding these difficulties is the disfavored status of the dominant remedy for adjudicated Section 2 violations. The majority-minority district is an entity that the Court at its most optimistic believes represents “the politics of second best,” and which various Justices condemn as a balkanizing and essentializing device.²² As this latter characterization suggests, Section 2 presents a host of nontrivial constitutional concerns, ranging from the equal protection issues that inhere in the official race-based considerations Section 2 mandates, to the questions about congressional power raised by a statute that proscribes a vast range of constitutional conduct.²³

Given these facets of Section 2, a seasoned Court watcher (including one who attended the oral argument in *LULAC*) might not have predicted that five Justices would find that Texas violated Section 2 when it split the city of Laredo between two congressional districts. More anticipated was the Court’s decision to let stand the state’s dismantling of a so-called coalition district in Fort Worth, but here, too, the rationale set forth in Justice Kennedy’s controlling opinion is surprising and demands explanation.

A. *What’s Wrong With Henry Bonilla?*

The *LULAC* majority held that the splitting of Laredo violated Section 2 because of a confluence of factors. These factors include the “long history of discrimination against Latinos” in Texas, both in the electoral arena and in socio-economic realms,²⁴ a diminished capacity to participate in the political process because of this historic discrimination,²⁵ the political cohesiveness of Laredo’s Latino community,²⁶ the “unresponsive[ness]” of Representative

as part of the Section 2 inquiry); *Gingles*, 478 U.S. at 50–51 (setting forth three preconditions to a Section 2 inquiry).

²¹ See 42 U.S.C. § 1973 (2000).

²² See, e.g., *Johnson*, 512 U.S. at 1020 (noting that such districts rely on “the ‘politics of second best’”) (quoting BERNARD GROFMAN, LISA HANDLEY & RICHARD G. NIEMI, *MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY* 136 (1992)); *Holder v. Hall*, 512 U.S. 874, 892 (1993) (Thomas, J., dissenting).

²³ See Katz, *Reinforcing Representation*, *supra* note 12, at 2403.

²⁴ *LULAC*, 126 S. Ct. 2594, 2622 (2006) (quoting *Session v. Perry*, 298 F. Supp. 2d 451, 473 (E.D. Tex. 2004)).

²⁵ *Id.* (“[T]he ‘political, social, and economic legacy of past discrimination’ for Latinos in Texas . . . may well ‘hinder their ability to participate effectively in the political process.’”) (quoting *Session*, 298 F. Supp. 2d at 492; *Thornburg v. Gingles*, 478 U.S. 30, 45 (1986)).

²⁶ See *id.* at 2621–23.

Henry Bonilla to Latino interests in Laredo,²⁷ and the state's "tenuous" justification for splitting the city between two congressional districts.²⁸ Justice Kennedy analyzed each of these factors in a markedly pro-plaintiff manner, resisting the tendency of various lower court judges to read the Section 2 factors narrowly.

Justice Kennedy, for example, credited as probative of historic discrimination against Latinos in Texas a list of long defunct practices "stretching back to Reconstruction"—practices such as the poll tax, the white primary, and restrictive registration periods.²⁹ A number of lower courts, by contrast, have disregarded evidence of far more recent acts of official discrimination on the ground that the events were "too remote in time,"³⁰ and were no longer prevalent.³¹ So too, Justice Kennedy found that the "political, social, and economic legacy of past discrimination" against Latinos in Texas "may well hinder their ability to participate effectively in the political process."³² Several lower courts, however, have refused to link past discrimination to the present inability of Latino plaintiffs to participate effectively, reasoning that contemporary electoral difficulties Latino voters confront stem, at least in part, from conditions in Mexico and other foreign countries.³³

²⁷ *Id.* at 2622 ("Latinos' diminishing electoral support for Bonilla indicates their belief he was 'unresponsive to [their] particularized needs . . .'" (quoting *Gingles*, 478 U.S. at 45).

²⁸ *Id.* at 2623.

²⁹ *Id.* at 2622 (quoting *Vera v. Richards*, 861 F. Supp. 1304, 1317 (S.D. Tex. 1994)).

³⁰ *See, e.g., Barnett v. City of Chicago*, 969 F. Supp. 1359, 1446 (N.D. Ill. 1997); *see also Cousin v. Sundquist*, 145 F.3d 818, 832 (6th Cir. 1998).

³¹ *See, e.g., Vecinos de Barrio Uno v. City of Holyoke*, 960 F. Supp. 515, 526 (D. Mass. 1997) ("The 1995 election witnessed the complete absence of election-related problems that plagued elections in the 1980's."); *Washington v. Tensas Parish Sch. Bd.*, 819 F.2d 609, 612 (5th Cir. 1987); *Monroe v. City of Woodville*, 688 F. Supp. 255, 260 (S.D. Miss. 1988); *Latino Political Action Comm., Inc. v. City of Boston*, 609 F. Supp. 739, 745 (D. Mass. 1985). *See also Barnett*, 969 F. Supp. at 1449; *Solomon v. Liberty County*, 957 F. Supp. 1522, 1565 (N.D. Fla. 1997); *Reed v. Town of Babylon*, 914 F. Supp. 843, 889 (E.D.N.Y. 1996); *Sanchez v. Colorado*, 861 F. Supp. 1516, 1529 (D. Colo. 1994); *NAACP v. City of Columbia*, 850 F. Supp. 404, 424 (D.S.C. 1993); *Brown v. Bd. of Comm'rs*, 722 F. Supp. 380, 396 (E.D. Tenn. 1989); *Sierra v. El Paso Indep. Sch. Dist.*, 591 F. Supp. 802, 810 (W.D. Tex. 1984).

³² *LULAC*, 126 S. Ct. at 2622 (internal citations omitted).

³³ *See, e.g., Perez v. Pasadena Indep. Sch. Dist.*, 958 F. Supp. 1196, 1225 (S.D. Tex. 1997) ("The socioeconomic data . . . does not distinguish between Hispanics who are recent immigrants and those who have been in this country for longer periods, particularly those who are citizens."); *Aldasoro v. Kennerson*, 922 F. Supp. 339, 365 (S.D. Cal. 1995) ("Hispanics are characterized by lower socioeconomic status than Anglos, but many Hispanics in El Centro have immigrated recently from Mexico, a third world country, and naturally are characterized by lower socioeconomic status. . . . Therefore, it is critical to distinguish between foreign born and native born Hispanics in addressing this Senate factor. Plaintiffs' evidence failed to make this distinction.");

Justice Kennedy's opinion credited both a history of past discrimination and its contemporary deleterious effect, notwithstanding his observation that Latino voters in Laredo had been "politically active, with a marked and continuous rise in Spanish-surnamed voter registration."³⁴ Lower courts have relied on registration and turnout statistics to dismiss past discrimination, be it political or socio-economic, as inconsequential.³⁵ Justice Kennedy, by contrast, declined to equate unimpeded access to the ballot box with full political participation.

Justice Kennedy did not discount evidence that voting is racially polarized in southwestern Texas even though partisanship contributed to Anglo support for (and Latino opposition to) Laredo Representative Henry Bonilla.³⁶ Nor did Justice Kennedy reflexively uphold incumbency protection as a legitimate justification for a challenged district, as some lower courts have done.³⁷ Instead, *LULAC* is one of the rare Section 2 cases to deem the policy underlying a challenged practice to be tenuous, here on the ground that the pursuit of incumbency protection diluted minority voting strength.³⁸

Finally, Justice Kennedy labeled Representative Bonilla unresponsive to Latino interests based on the simple fact that Latino voters did not support him.³⁹ Lower courts have infrequently found elected representatives unresponsive, particularly absent evidence of affirmative discrimination

Sierra, 591 F. Supp. at 807, 809–10 (finding discrepancies in socioeconomic status between Hispanics and whites, but holding that "the record fails to show how many of those affected by unemployment are recent immigrants or resident aliens as opposed to citizens" as well as that "[t]he evidence . . . fails to show how many residents of South El Paso were educated (or not educated) in Mexico rather than in the United States").

³⁴ *LULAC*, 126 S. Ct. at 2621.

³⁵ See Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. MICH. J. L. REFORM 643, 676 n.173 (2006) (citing cases).

³⁶ *LULAC*, 126 S. Ct. at 2615 (noting voting was racially polarized).

³⁷ *Id.* at 2622. Cf. *Prejean v. Foster*, 83 F. App'x 5, 11 (5th Cir. 2003); *McMillan v. Escambia County*, 638 F.2d 1239, 1245 (5th Cir. 1981); *Fund for Accurate and Informed Representation, Inc. v. Weprin*, 796 F. Supp. 662, 670, 672 (N.D.N.Y. 1992).

³⁸ *LULAC*, 126 S. Ct. at 2623. Cf. Ellen D. Katz, *Not Like the South? Regional Variation and Political Participation through the Lens of Section 2*, in VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION, AND POWER 183, 216 tbl.8.2 (Ana Henderson ed., Berkeley Public Policy Press 2007) (chart documenting that 23 (7%) of the 331 published Section 2 lawsuits have deemed the policy underlying a challenged policy to be tenuous), available at http://www.law.berkeley.edu/centers/ewi/research_VotingRights.html. Some lower courts have declared incumbency protection a tenuous policy in this circumstance. See, e.g., *Ketchum v. Byrne*, 740 F.2d 1398, 1408 (7th Cir. 1984); *Black Political Task Force v. Galvin*, 300 F. Supp. 2d 291, 313 (D. Mass. 2004); *Gingles v. Edmisten*, 590 F. Supp. 345, 374 (E.D.N.C. 1984); *Buskey v. Oliver*, 565 F. Supp. 1473, 1483 (M.D. Ala. 1983).

³⁹ *LULAC*, 126 S. Ct. at 2622.

directed at the minority community. Justice Kennedy nevertheless easily appends the label, relying on a novel and expansive measure of unresponsiveness that dispenses with the examination of substantive policy and constituent access that lower courts have used to assess responsiveness.⁴⁰

Read together, these findings render Justice Kennedy's majority opinion in *LULAC* a vigorous application of Section 2 in *Laredo*. To be sure, the analysis is hardly unprecedented (with the exception of the designation of Representative Bonilla as unresponsive based solely on electoral returns), and for every lower court that grudgingly applied the Section 2 factors, others have read them in the more plaintiff-friendly manner employed by Justice Kennedy. Even so, Justice Kennedy's willingness to do so is surprising, particularly given the wariness with which the Court has viewed Section 2, and the skepticism that Justice Kennedy in particular has expressed about the statute.⁴¹

Lower courts have resisted broad readings of the Section 2 factors for many reasons, but a persistent and animating concern has been the belief that the statute, vigorously applied, necessarily devolves into a mandate for proportional representation based on race. The Chief Justice famously raised this concern back in 1982 when, as a young attorney in the Reagan Justice Department, he opposed amending Section 2 to create a results-based test for discrimination in voting.⁴²

Roberts's position, of course, did not carry the day.⁴³ But the concern he raised persisted because Section 2, as amended, eliminated the two most obvious ways to guard against proportional representation: namely, by cabining the statute's reach to those practices that were motivated by discriminatory intent or that impeded access to the ballot box. The 1982 amendment to Section 2 made clear that intent is not a component of the statutory injury.⁴⁴

The fear that Section 2, as amended, would functionally (if not formally) mandate proportional representation has led dozens of federal courts to interpret Section 2 in a manner more consistent with the legal regime Roberts

⁴⁰ Katz, *Not Like the South?*, *supra* note 38, at 216 tbl.8.2 (documenting that 20 of the 331 published Section 2 lawsuits documented a lack of responsiveness).

⁴¹ See, e.g., *Johnson v. De Grandy*, 512 U.S. 997, 1028–29 (1994) (Kennedy, J., concurring); *Chisom v. Roemer*, 501 U.S. 380, 418 (1991) (Kennedy, J., dissenting).

⁴² Memorandum from John Roberts on Section 2 of the Voting Rights Act to the Attorney General (Dec. 22, 1981), *available at* <http://www.archives.gov/news/john-roberts/accession-60-88-0498> (Roberts argued that moving to a results-based ban would inevitably lead federal courts to invalidate any electoral system that is not neatly tailored to achieve proportional representation along racial lines. The consequence would be “a quota system for electoral politics.”).

⁴³ See 42 U.S.C. § 1973 (2000).

⁴⁴ *Cf. Bolden v. City of Mobile*, 423 F. Supp. 384, 387, 399 (S.D. Ala. 1976) (observing that African-American voters in Mobile lacked “full voting rights,” notwithstanding their ability to “register and vote without hindrance”).

sought than with the one Congress enacted. They have done so not through express holding, but instead through narrow constructions of the factors comprising the Section 2 inquiry. They have, for instance, discounted evidence of past discrimination when it fails to link the named defendants with acts of intentional discrimination, because, for instance, the discrimination took place long ago or in another jurisdiction; they have also deemed past discrimination inconsequential when minority residents “register and vote without hindrance.”⁴⁵

Some language in Justice Kennedy’s *LULAC* opinion seems consistent with this approach. While Section 2 prohibits electoral practices that impair minority political participation regardless of the underlying motivation, Justice Kennedy expressly notes that the Laredo district “bears the mark of intentional discrimination.”⁴⁶ Insofar as this characterization was critical to the Court’s holding, *LULAC* would seemingly do no more than affirm the incontrovertible proposition that the state may not intentionally impair minority political participation.

I think *LULAC* does more. Justice Kennedy describes in detail how the new boundary affected political participation in Laredo’s Latino community. Latino “voters were poised to elect their candidate of choice,”⁴⁷ and the state “made fruitless the Latinos’ mobilization efforts.”⁴⁸ Latino voters were “cohesive,” and “politically active,” a fact Justice Kennedy thought so important that he mentioned it four separate times.⁴⁹ And Justice Kennedy explicitly wrote that “the State must be held accountable for the *effect* of [its districting] choices in denying equal opportunity to Latino voters.”⁵⁰

The heated dispute between the Chief Justice and Justice Kennedy regarding District 25 makes clear that *LULAC*’s holding did not hinge on discriminatory motivation. District 25 was the so-called “bacon strip” district that linked Latino voters on the Mexican border with those living hundreds of miles away in Austin. Texas argued that the Voting Rights Act required the creation of a district like District 25 to compensate for the displacement of Latino voters in Laredo.⁵¹ Justice Kennedy found this substitute insufficient given that it sought to unite “far-flung segments of a racial group with disparate interests.”⁵² The Chief Justice, by contrast, found nothing

⁴⁵ *Id.* at 387. See, e.g., Katz et al., *Documenting Discrimination*, *supra* note 35, at 676 n.173, 695–97, 705–07.

⁴⁶ *LULAC*, 126 S. Ct. 2594, 2622 (2006).

⁴⁷ *Id.* at 2621.

⁴⁸ *Id.* at 2622.

⁴⁹ *Id.* at 2621, 2622, 2623.

⁵⁰ *Id.* at 2623 (emphasis added).

⁵¹ *Id.* at 2616.

⁵² *LULAC*, 126 S. Ct. at 2618.

objectionable about District 25, deeming it adequate to offset what was done in Laredo.⁵³

This disagreement makes little sense if, in fact, either Justice thought invidious intent produced District 23. The state could hardly “offset” unconstitutional conduct in Laredo by creating District 25, whatever its demographic and geographic contours.

The disagreement also suggests the Chief Justice subscribes to the core tenets of Section 2. His conviction that District 25 was an adequate “offset” assumes that Texas did something wrong in Laredo that needed to be offset. The opinion thus implies that Chief Justice Roberts too would have ordered the reconfiguration of the Laredo district had Texas failed to create what he thought was an adequate substitute. The Chief Justice, moreover, read Section 2 more expansively than the Court’s majority when he argued against saddling Section 2 plaintiffs with an additional burden of demonstrating “cultural compactness,” the novel concept Justice Kennedy used to discredit District 25.⁵⁴

Chief Justice Roberts might easily have lodged more resistance to the core of Justice Kennedy’s analysis. He might have joined Justices Scalia and Thomas, who argue that racial vote dilution is not judicially cognizable.⁵⁵ Alternatively, he might have narrowly read the elements of the Section 2 inquiry, as various lower courts have done,⁵⁶ and held that the totality of circumstances failed to establish a statutory violation in Laredo.

That he declined to do so is as unexpected as Justice Kennedy’s identification of a Section 2 violation itself. A newfound readiness to embrace proportional representation might be the explanation, but that hardly seems likely. Instead, I think the Chief Justice and Justice Kennedy embraced Section 2 to the extent that they did in *LULAC* because of a simple fact: elections in Laredo had been competitive prior to redistricting.

Had Texas not engaged in unprecedented “re-redistricting” in 2003, Latino voters would have come to control the Laredo district as defined by the boundaries set by the court-drawn districting plan adopted in 2001.⁵⁷ Congressman Bonilla would have lost his seat in 2004, and the district would have remained safely majority-Latino and safely Democratic for the remainder of the decade. Imagine for a moment, however, that the Laredo district had already been safely majority-minority when Texas split the city in 2003. Would the Court have decided *LULAC* the same way?

Conventional doctrine, of course, suggests that the answer should be yes, and that the plaintiffs’ claim would have been stronger had Latino voters

⁵³ *Id.* at 2661 (Roberts, C.J., joined by Alito, J., concurring in part and dissenting in part).

⁵⁴ See Ortiz, *supra* note 2, at 48.

⁵⁵ See, e.g., Holder v. Hall, 512 U.S. 874, 891–946 (1994) (Thomas J., concurring).

⁵⁶ See *supra* notes 30–40 and accompanying text.

⁵⁷ *LULAC*, 126 S. Ct. at 2613.

controlled the district prior to the challenged redistricting. The Laredo plaintiffs claimed entitlement to a district that they did not control, even though such control is often thought to be a prerequisite to a Section 2 claim.⁵⁸ They claimed, moreover, a denial of equal opportunity to participate, notwithstanding the “marked and continuous rise in Spanish-surnamed voter registration,”⁵⁹ a sign of political engagement lower courts have equated with meaningful and adequate political participation.⁶⁰

For Justice Kennedy, neither the existence of competition nor the political engagement it fostered diminished the plaintiffs’ claim. He emphasized that pre-existing control is not a necessary element of a successful Section 2 claim,⁶¹ and suggested that rising voter registration rates only strengthened the plaintiffs’ claim by offering one sign that the community was becoming “politically active” and engaged.⁶²

Liability under Section 2 hinges on many things, but a “politically active” minority community has not previously been one of them. This engagement nevertheless captured why the Court thought Texas injured Latino voters when it split Laredo in 2003. The new line eliminated the prospect that Latino voters might elect a representative of choice. This prospect mattered precisely because it had been a prospect, that is, a possibility, and not a certain result. This prospect of victory—not its guarantee—was why Latino voters had been increasingly “politically active” in Laredo. Eliminating this prospect was sure to eliminate the political engagement it fostered. That’s what I think Justice Kennedy meant when he said the new district line “undermined the progress of a racial group.”⁶³

Progress is not ensured victory but engaged participation. The competitive nature of the Laredo district made this engagement possible, and being politically engaged was what ultimately made the political influence of Laredo’s Latino voters worth protecting. It’s also what distinguished them, in the Court’s eyes, from African-American voters in Fort Worth.

B. *What’s Wrong With Martin Frost?*

LULAC’s rejection of a Section 2 claim brought by African-Americans in Fort Worth was, in one sense, unsurprising. Lower courts have long been

⁵⁸ Cf. *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986) (describing first “precondition[]” to a Section 2 claim is that plaintiffs are sufficiently large to constitute a majority in a single member district).

⁵⁹ *LULAC*, 126 S. Ct. at 2621.

⁶⁰ See *supra* notes 29–34 and accompanying text.

⁶¹ *LULAC*, 126 S. Ct. at 2615–21 (noting Latino voters had been “poised to elect their candidate of choice,” and that a group’s failure to “win elections does not resolve the issue of vote dilution”).

⁶² *Id.* at 2621–22.

⁶³ *Id.* at 2621.

divided over the question of whether Section 2 protects minority interests in coalition districts, districts where minority voters comprise less than half the electorate but nevertheless control electoral outcomes.⁶⁴ The cross-racial coalitions that define these districts highlight a breakdown of racially polarized voting. This development might be fostered by according Section 2 protection to minority interests in coalition districts, but it also signals the emergence of healthy political interactions among interest groups that might appropriately be held to fall outside the ambit of Section 2.

The Court in *LULAC* was seemingly poised to hold that Section 2 does not protect minority interests in coalition districts.⁶⁵ Justice Kennedy's controlling opinion nevertheless left that question open, and instead resolved the question presented by denying that the Fort Worth district dismantled in 2003 had been a true coalition district.⁶⁶

African-American voters in Fort Worth had constituted a majority of the primary electorate in what had been a safely Democratic district. They consistently voted for Martin Frost, an Anglo Democrat who repeatedly ran unopposed in the primary and represented the district in Congress for nearly thirty years. Justice Kennedy deemed these facts insufficient to make Frost the African-American candidate of choice or establish that black voters controlled his election. After all, the opinion posits, had "an African-American candidate of choice" ever challenged Frost in the primary, white and Latino voters might have participated in greater numbers.⁶⁷ The assumption is that Frost would have prevailed in this circumstance, the absence of black support notwithstanding, and consequently, that "Anglo Democrats control[led] this district."⁶⁸

By imagining this "African-American candidate of choice," Justice Kennedy posits that Frost might not have been the African-American preferred candidate, even though black voters consistently voted for him in the primary and general elections. The suggestion is that black voters in Fort Worth would have supported someone other than Martin Frost, but did not, because Frost would have defeated that candidate. The consequence, Justice Kennedy maintains, is that we cannot be sure that Frost's dominance in the district was necessarily the result of African-American control in Fort Worth.

Lower courts have long disagreed about whether the minority-preferred candidate may be identified simply by identifying the candidate who receives

⁶⁴ Compare *Metts v. Murphy*, 363 F.3d 8, 11 (1st Cir. 2004); *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 443 (S.D.N.Y. 2004); *Page v. Bartels*, 144 F. Supp. 2d 346, 362 (D.N.J. 2001); *Armour v. Ohio*, 775 F. Supp. 1044, 1059–60 (N.D. Ohio 1991); *with Hall v. Virginia*, 385 F.3d 421, 430 (4th Cir. 2004); *Nixon v. Kent County*, 76 F.3d 1381, 1386 (6th Cir. 1996) (*en banc*).

⁶⁵ See *supra* text following note 23.

⁶⁶ *LULAC*, 126 S. Ct. at 2624–26.

⁶⁷ *Id.* at 2625.

⁶⁸ *Id.* at 2624 (quoting *Session v. Perry*, 298 F. Supp. 2d 451, 483–84 (2004)).

the most minority votes. Some courts hold that the inquiry should be limited to election returns,⁶⁹ while others demand a more searching inquiry. This latter approach, typically associated with the Third Circuit's decision in *Jenkins v. Red Clay School District*,⁷⁰ deems election results a preliminary component of an inquiry that proceeds to examine the depth and vigor of minority support for that candidate, the scope of that candidate's interest in the minority community, whether and why a viable minority candidate did not run, and whether minority candidates had run previously.⁷¹

Martin Frost, of course, would have fared well under these additional criteria. Not only did African-American voters consistently vote for him, but considerable evidence presented in the district court suggested that black support for Frost had been strong and stable. The state's own expert witness testified that Frost was the black-preferred candidate.⁷² Former Dallas mayor Ron Kirk said that Frost "has gained a very strong base of support among African-American[s]" and has "an incredible following and amount of respect among the African-American community."⁷³ Justice Souter observed in dissent that Frost "was strongly supported by minority voters after more than two decades of sedulously considering minority interests," that the NAACP ranked Frost's voting record higher than any other member of the

⁶⁹ See, e.g., *Ruiz v. City of Santa Maria*, 160 F.3d 543, 552 (9th Cir. 1998) (preferring "[a] bright-line rule . . . based on the premise 'that the ballot box provides the best and most objective proxy for determining who constitutes a representative of choice'" (internal citations omitted)); *NAACP v. City of Niagara Falls*, 65 F.3d 1002, 1018 (2d Cir. 1995) ("[W]e believe that evaluating whether a person is, 'as a realistic matter,' minority-preferred—based on subjective indicators such as 'anecdotal testimonial evidence'—is a dubious judicial task, and one that can degenerate into racial stereotyping of a high order.").

⁷⁰ *Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1129 (3d Cir. 1993).

⁷¹ See, e.g., *id.* at 1129 (finding that evidence showing non-minority candidate to be minority-preferred includes minority "sponsorship" of the candidate, the level of attention the candidate pays to the minority community, the level of minority turnout for white-on-white elections compared to elections involving a minority candidate, the disincentives minority candidates confront and difficulties they face in qualifying for office, and the extent minority candidates have run in the past); *Sanchez v. Colorado*, 97 F.3d 1303, 1321 (10th Cir. 1996) (adopting approach from *Jenkins*); *Harvell v. Blytheville Sch. Dist.*, 71 F.3d 1382, 1386 (8th Cir. 1995) (stating circuit will follow Third Circuit's approach in *Jenkins*); *Nipper v. Smith*, 39 F.3d 1494, 1540 (11th Cir. 1994) (requiring evidence of strong preference before white candidate will be considered minority-preferred and permitting such evidence to include anecdotal evidence, polling and turnout data, and a review of appeals made during the campaign); *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 997–1017 (D.S.D. 2004) (considering anecdotal evidence such as the formation of advocacy organizations, political parties targeting the minority group, get-out-the-vote efforts, and politicians' testimony, as well as statistical evidence in determining cohesion and bloc voting).

⁷² *LULAC*, 126 S. Ct. at 2650 (Souter, J., dissenting).

⁷³ *Id.* at 2651.

Texas congressional delegation, and that Frost "was convincingly shown to have been the 'chosen representative' of black voters in old District 24."⁷⁴

Justice Kennedy acknowledged that the evidence "could signify [Frost] is their candidate of choice."⁷⁵ He nevertheless thought the evidence insufficient to displace the district court's contrary finding.⁷⁶ In particular, Justice Kennedy cited testimony from one witness that the district "was drawn for an Anglo Democrat,"⁷⁷ and testimony from another that "Anglo Democrats [elected] in such 'influence districts' were not fully responsive to the needs of the African-American community."⁷⁸

Justice Kennedy's deference to the trial court on this issue is far from unprecedented, and would be of little note had the Fort Worth Section 2 claim been the only question before the Court in *LULAC*. But the Court was also considering the validity of the statewide partisan gerrymander and the Section 2 claim raised in Laredo. Comparing the disposition of the Fort Worth claim with the Court's disposition of those other issues suggests that something more than simple deference to the fact finder was involved.

Prior to the challenged redistricting in Laredo, the Latino-preferred candidate (identified implicitly in *LULAC* as the candidate for whom Latino voters voted, and not by the more complex test used in Fort Worth), consistently lost, and the district had long been represented by Henry Bonilla, a candidate who received negligible Latino support. Prior to redistricting in Fort Worth, the candidate black voters consistently supported in both the primary and general election was repeatedly re-elected, and black voters thought that candidate was a pretty good one, even if he might not have been ideal in every respect. The 2003 redistricting shattered both the Laredo and Fort Worth districts, but, *LULAC* holds, caused cognizable injury only to Latino voters in Laredo.

Under conventional doctrine, the identification of a Section 2 violation in Laredo says nothing about whether Latino voting strength in the pre-existing district had been diluted. Instead, the finding of dilution signals that Latino voting strength under the new district line fell short of what Latino voting strength would be in some imagined district where the boundary line was non-dilutive.⁷⁹ *LULAC* nevertheless celebrated Latino political participation in Laredo prior to redistricting in a manner that suggests the harm redistricting caused in Laredo was based not on some abstract, imagined measure of undiluted Latino voting strength, but instead on the voting strength Latino voters actually enjoyed in Laredo prior to

⁷⁴ *Id.* at 2650–51.

⁷⁵ *Id.* at 2624 (opinion of Kennedy, J.).

⁷⁶ *Id.*

⁷⁷ *Id.* at 2624–25.

⁷⁸ *LULAC*, 126 S. Ct. at 2625 (opinion of Kennedy, J.).

⁷⁹ See *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 479 (1997).

redistricting.⁸⁰ That is, the Court held the new district to be dilutive precisely because Latino political participation seemed so vibrant prior to redistricting. In so doing, *LULAC* suggests that, prior to 2003, there was something about Latino political participation in Laredo that was worth protecting.⁸¹

The Court, by contrast, did not think African-American participation in Fort Worth warranted similar protection. Prior to redistricting, the candidate black voters supported in Fort Worth consistently won and actively promoted their interests. After redistricting, black voters found themselves in various Republican-dominated districts where they had no hope of influence. *LULAC* nevertheless holds that the 2003 redistricting caused black voters no cognizable harm under Section 2.

Why did Latino voters win in Laredo and African-American voters lose in Fort Worth? I think the explanation lies in Justice Kennedy's imagined "African-American candidate of choice." This hypothetical Fort Worth candidate was the one who would prompt Anglo and Latino voters to turn out to ensure Frost's victory.⁸² This hypothetical scenario captures why we cannot be sure Frost was genuinely minority preferred: Frost was perennially unopposed. The Fort Worth district was not only safely Democratic, it was safely Martin Frost's district, with the absence of competition seeping into the primary itself. And, of course, the district was drawn precisely for that purpose. As Justice Kennedy properly reminds us, Frost himself was the "architect" behind the 1991 Democratic gerrymander to which the Republicans' 2003 foray into re-redistricting was largely a response.⁸³

In this sense, Martin Frost was the Democratic Henry Bonilla, and the Fort Worth district was the product of the same form of incumbency protection that Justice Kennedy found to be problematic in Laredo. As a matter of traditional doctrine, of course, this parallel has no bearing on the question of whether either district gave rise to racial vote dilution. And yet, the role of partisan gerrymandering and specifically incumbency protection in the creation of each district was crucial to Justice Kennedy's analysis of dilution in each location.

Incumbency protection, as pursued in Laredo, destroyed what made the Latino community there worth protecting—hence, Justice Kennedy's repeated references to Laredo's energetic, cohesive, "politically active" Latino community.⁸⁴ The prospect of defeating Bonilla mobilized Laredo's Latino voters, while the redistricting plan eliminated that prospect and the political engagement it engendered. In Fort Worth, incumbency protection prevented the district from becoming a forum in which such an engaged community might emerge. Propelling Justice Kennedy's skepticism that

⁸⁰ See *supra* notes 34, 47–49 and accompanying text.

⁸¹ See *supra* Part II.A.

⁸² *LULAC*, 126 S. Ct. at 2624–25.

⁸³ *Id.* at 2605.

⁸⁴ See *supra* note 49 and accompanying text.

African-American voters truly preferred Frost was the conviction that the Fort Worth district, created by Martin Frost for Martin Frost, was not an environment in which a meaningful preference for a political candidate could be expressed and, consequently, where a vibrant political community could arise and flourish.

The 2003 districting plan shattered Martin Frost's district and scattered African-American voters from that district among several surrounding districts, where no prospect for black (Democratic) influence existed. In Justice Kennedy's controlling view, the type of political participation the new districts offered, poor as it was, was no worse than the type of participation to which black voters claimed an entitlement, namely the type of participation that had been available in what Justice Kennedy properly saw as Martin Frost's fiefdom. Measuring dilution against that benchmark, *LULAC* finds that the new districting plan caused black voters no injury under Section 2.

By granting relief in Laredo but not in Fort Worth, *LULAC* suggests that Section 2 protects minority interests in competitive districts but not in noncompetitive ones. This suggested link between racial vote dilution and competitive elections is a radical one. Were the Court to develop it, *LULAC* will have launched a fundamentally new approach to minority political participation. The present focus on electoral outcomes will be replaced with an inquiry more concerned with the process that produces those outcomes.

The focus on electoral outcomes stems primarily from the Supreme Court's decision twenty years ago in *Thornburg v. Gingles*.⁸⁵ The Court in *Gingles* sought to resolve disagreement among lower courts regarding the application of the 1982 amendment to Section 2,⁸⁶ and clarify the circumstances under which Section 2 liability exists. Specifically addressing the question whether a challenged multimember districting plan diluted black vote strength, *Gingles* distilled three "preconditions" to a Section 2 claim: plaintiffs must demonstrate, first, that the minority group is sufficiently large and geographically compact to constitute a majority in a single member district; second, that the group is politically cohesive; and third, that the white majority votes sufficiently as a bloc to defeat the minority-preferred candidate.⁸⁷

The *Gingles* preconditions critically inform the question of liability under Section 2. Satisfying these conditions does not itself establish a Section 2 violation, but plaintiffs who successfully traverse the *Gingles* threshold typically prevail,⁸⁸ and those who cannot almost always find their

⁸⁵ 478 U.S. 30, 50 (1986).

⁸⁶ See GROFMAN, HANDLEY & NIEMI, *supra* note 22, at 42-49 (1992).

⁸⁷ *Gingles*, 478 U.S. at 50.

⁸⁸ See Katz, *Documenting Discrimination*, *supra* note 35, at 660 (finding that, of the published Section 2 decisions since 1982, courts in 68 lawsuits found the preconditions to be satisfied, and that 57 of these lawsuits proceeded to outcomes favorable to the plaintiffs).

case at an end.⁸⁹ The *Gingles* framework accordingly identifies circumstances likely to give rise to liability under Section 2.⁹⁰ The decision does not, however, mandate any specific remedy for racial vote dilution once assessed. Thus, while *Gingles* specifically calls on plaintiffs to demonstrate that a compact majority-minority district might be drawn, it does not hold that the majority-minority district is the exclusive or even the preferred remedy for racial vote dilution under Section 2. As Judge Heaney recently observed, “the *Gingles* preconditions are designed to establish liability, and not a remedy.”⁹¹

Gingles has nevertheless been understood as setting forth just such a mandate,⁹² and the framework certainly invites the creation of majority-minority districts.⁹³ And for good reason. Such districts offer a remedy for racial vote dilution, at least as it has been traditionally understood, and offer a venue that may itself erode racial polarization among voters.⁹⁴ When voting is racially polarized, these districts enable minority voters to elect candidates of choice when doing so would not otherwise have been possible. Some have also argued that a minority presence in the legislature encourages minority voter turnout,⁹⁵ and, at least in some circumstances, yields policies more favorable to minority interests than would otherwise be produced.⁹⁶ Majority-minority districts ensure a constant, rather than sporadic, minority legislative presence, which allows minority legislators to accumulate seniority, and makes complete minority exclusion from important legislative deals less likely.⁹⁷

⁸⁹ See Katz, *Documenting Discrimination*, *supra* note 35, at 660.

⁹⁰ *Gingles*, 478 U.S. at 50–51.

⁹¹ See *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1019 (8th Cir. 2006).

⁹² See generally ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 294 (2000) (“[*Gingles*] served as a mandate, for state lawmakers as well as Justice Department officials engaged in the preclearance process, to create ‘majority-minority’ voting districts in cities and states that contained sizable minority populations and had a record of racially polarized voting.”).

⁹³ *Id.* at 294 (“[*Gingles*] encouraged both the lower courts and the Justice Department to promote single-member and ‘minority opportunity’ districts in the numerous locales where the *Gingles* criteria were met.”).

⁹⁴ See, e.g., CANON, *supra* note 16, at 204–05, 261.

⁹⁵ See, e.g., KATHERINE TATE, *FROM PROTEST TO POLITICS: THE NEW BLACK VOTERS IN AMERICAN ELECTIONS* 81 (1993); Kathryn Abrams, “*Raising Politics Up*”: *Minority Political Participation and Section 2 of the Voting Rights Act*, 63 N.Y.U. L. REV. 449, 501 (1988). Cf. LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* 68, 85 (1994); Bernard Grofman & Lisa Handley, *1990s Issues in Voting Rights*, 65 MISS. L.J. 205, 268–69 (1995).

⁹⁶ See Pamela S. Karlan, *Loss and Redemption: Voting Rights at the Turn of a Century*, 50 VAND. L. REV. 291, 302–07 (1997).

⁹⁷ See Pamela S. Karlan, *Georgia v. Ashcroft and the Retrogression of Retrogression*, 3 ELECTION L.J. 21, 30 (2004).

Majority-minority districts are invariably also noncompetitive districts, given that minority voters typically vote for Democratic candidates. As *LULAC* suggests, these districts offer a form of political participation that is less than optimal, even absent the racial considerations that prompted the Court to describe them as “second best.”⁹⁸ Particularly where the absence of competition seeps into the Democratic primary, a noncompetitive district becomes a forum unlikely to generate the engagement and vibrancy Justice Kennedy thought had been manifest in Laredo. Such districts are more likely to function as places where “true” minority and majority preferences cannot be discerned, as the Court found to be the case in the protectorate Martin Frost created for himself in Fort Worth.

LULAC, of course, did not directly call into question the privileged status of the majority-minority district under Section 2. Martin Frost’s Fort Worth district was notably not such a district, and had it been, then perhaps, the district’s elected representative might be deemed minority-preferred, the absence of competition notwithstanding. Still, such a judgment requires implicit assumptions about African-American political cohesion that the absence of competition renders untestable. Justice Kennedy, in particular, is likely to be skeptical about making such assumptions.⁹⁹

If so, *LULAC* casts doubt on the continued viability of the majority-minority district as a preferred form of minority representation. Through its resolution of the Laredo and Fort Worth claims, *LULAC* suggests that the circumstances that presently entitle (or at least enable) minority voters to secure representation in majority-minority districts may not suffice for long.

That development is cause for concern, but nevertheless one that may well be worth welcoming. The Roberts Court, like the Rehnquist and Burger Courts before it, was never going to embrace wholesale the majority-minority district and the race-based districting moves its generation requires. By privileging a competitive process over a guaranteed outcome, the Court in *LULAC* was able to identify for the first time specific conduct that runs afoul of Section 2. In so doing, the Court identified at least one racially-defined community that warrants statutory protection, and thereby affirmed the principle that jurisdictions must respect some racially-defined communities when they draw district lines. The invalidation of the Laredo district necessarily implies that we must not only “account for the differences between people of the same race,”¹⁰⁰ but we must respect their similarities as well. Race need not be a predicament from which we must escape, but may

⁹⁸ *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994) (noting that such districts rely on “the ‘politics of second best’”) (quoting BERNARD GROFMAN, LISA HANDLEY & RICHARD NIEMI, *MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY* 136 (1992)); *Holder v. Hall*, 512 U.S. 874, 892 (1994) (Thomas, J., dissenting).

⁹⁹ See *supra* note 41.

¹⁰⁰ *LULAC*, 126 S. Ct. 2594, 2618 (2006).

instead function as a quality that gives rise to valued communities that, at least in certain circumstances, warrant our protection.

That, of course, may simply be another way of saying that racial vote dilution is a cognizable harm—hardly a revolutionary proposition. *LULAC* nevertheless makes clear that Justice Kennedy subscribes to it. So apparently do the Court's two newest justices, whom, through Chief Justice Roberts' opinion, suggested that absent District 25 as an "offset," redistricting caused Latino voters in Laredo actionable injury under Section 2.¹⁰¹ That leaves only Justices Scalia and Thomas who deny that racial vote dilution is even something courts can remedy.

LULAC embraced Section 2 to the extent that it did by privileging process over outcome. It cast doubt on traditional efforts to shield cohesive minority groups from political competition. This move comes at some cost, given that the benefits majority-minority districts presently secure for minority voters may no longer be secure. At the same time, however, the move suggests not only that Section 2 itself may retain vitality in the Roberts Court, but that it might function as a catalyst for a different, and better, form of political participation. *LULAC*'s sense that Latino voters in Laredo lost something worth protecting, but that African-American voters in Fort Worth did not, signals the Court's inclination to favor engagement over security. It suggests that the Court might ultimately insist that the right to vote encompass something more than casting a ballot for a preordained victor. As such, *LULAC* not only promises to restructure opportunities for minority political participation, but also offers a nascent conception of political harm suffered by voters regardless of race when a political system is rigged to block competition. That is, if Justice Kennedy looks carefully, he may just find in Laredo and Fort Worth the standard he has been seeking to manage claims of partisan gerrymandering.

III. RETHINKING PARTISAN GERRYMANDERING

Twenty-one years ago Justice O'Connor told us not to worry about partisan gerrymandering. Concurring in *Davis v. Bandemer*,¹⁰² she suggested that political parties are not able to secure significant partisan advantage in the districting process because "political gerrymandering is a self-limiting enterprise."¹⁰³ Her premise was that maximizing overall party success requires party candidates to win individual seats by the narrowest margin possible. A party engaged in an "overambitious" partisan gerrymander will inevitably cut the margin too close, lose some seats, and ultimately lose its majority. Alternatively, that party's incumbents will resist efforts to make

¹⁰¹ See *supra* note 53 and accompanying text.

¹⁰² 478 U.S. 109 (1986).

¹⁰³ *Id.* at 152 (O'Connor, J., concurring) (citing BRUCE E. CAIN, *THE REAPPORTIONMENT PUZZLE* 151–59 (1984)).

safe seats more competitive and will block the gerrymander before it can be imposed. Either occurrence, Justice O'Connor wrote, will keep aggressive partisan gerrymandering in check.¹⁰⁴

As *LULAC* makes clear, things have not turned out quite as Justice O'Connor predicted. In one sense, of course, she prevailed. She characterized political gerrymandering as "self-limiting" back in *Davis v. Bandemer* to buttress her core belief that claims of partisan gerrymandering ought not to be justiciable. Five justices have yet to subscribe to that proposition in a single case, but the principle has been law for all practical purposes since *Davis* itself. The inability of any litigant to establish unconstitutional partisan gerrymandering means that the nominal justiciability of such claims, pesky as it may be, is of limited practical consequence.¹⁰⁵

But while governing law comports with Justice O'Connor's preference, districting practices have not played out as she anticipated. Of the redistricting plans adopted after the 2000 census, partisan gerrymanders abound,¹⁰⁶ many extreme in nature and perhaps none as remarkable as the one challenged in *LULAC* itself. Far from "self-limiting," partisan gerrymandering has become a pervasive and ever-expanding enterprise. So much so that when the Court revisited *Davis* in its 2004 decision *Vieth v. Jubelirer*,¹⁰⁷ Justice O'Connor could no longer claim that regulation of the practice was unnecessary. Instead, she joined Justice Scalia's plurality opinion, which acknowledged the severity of the problem, but nevertheless insisted that the remedy was not to be found with the Court.¹⁰⁸

Justice O'Connor erred in *Davis* by assuming that an "overambitious" partisan gerrymander required districts that verge on competitive. As it turns out, the party that controls the districting process can ensure its candidates easy victory while still maximizing overall party influence. All that is needed is the willingness to employ a host of fairly audacious, and, at present, perfectly legal districting moves.¹⁰⁹ That is precisely what the Republican-

¹⁰⁴ *Id.*

¹⁰⁵ See, e.g., ISSACHAROFF ET AL., *supra* note 13, at 886 ("*Bandemer* has served almost exclusively as an invitation to litigation without much prospect of redress.").

¹⁰⁶ See Issacharoff & Karlan, *supra* note 2.

¹⁰⁷ 541 U.S. 267 (2004).

¹⁰⁸ See *id.* at 292 (plurality opinion) (noting that "We do not disagree" with "the judgment" that "severe partisan gerrymanders [are incompatible] with democratic principles" and stating that the case presented the question of justiciability, not "whether severe partisan gerrymanders violate the Constitution"). See also *id.* at 317 (Kennedy, J., concurring in the judgment) (suggesting that partisan gerrymanders that disfavor one party are impermissible and deeming it "unfortunate" that legislators now view the districting process as a means to "rig[] elections.") (internal citation omitted); *id.* at 345 (Souter, J., dissenting) (noting that "the increasing efficiency of partisan redistricting has damaged the democratic process to a degree that our predecessors only began to imagine").

¹⁰⁹ See Issacharoff & Karlan, *supra* note 2, at 551-53.

controlled Texas government did back in 2003, when it insulated vulnerable Republican incumbents like Henry Bonilla and shattered the security previously enjoyed by Democrats like Martin Frost.

Congress, of course, could outlaw districting plans of this sort, but it will not, just as it did not remedy malapportionment a half-century ago.¹¹⁰ The consequence is that partisan gerrymandering will persist until the Court puts a stop to it. But while the need for judicial action is compelling, the Justices rightly turned back the challenges brought against the statewide gerrymanders in *Vieth* and *LULAC*. In both cases, the plaintiffs objected not to the insulation of Republican incumbents per se but to the concurrent failure of the districting plans to leave “enough” Democratic legislators in power. The core claim, simply put, was that the gerrymanders left the Democratic Party with insufficient power. The Justices balked at this contention, not so much because they disagreed with it, but because they were nonplussed as to how the Court could remedy it. Just how much power should Democrats in Texas have anyway? The Justices have never been comfortable assessing the appropriate level of representation to which any group might demand an entitlement.

The Court overcame, or more precisely, bypassed this discomfort when it struck down the Laredo district as dilutive under Section 2. In the majority’s view, the Latino plaintiffs were claiming an entitlement not to a particular electoral outcome, but instead to a particular sort of electoral process, one that allowed them a fair opportunity to compete. The Fort Worth plaintiffs, by contrast, seemed much more like the Democrats challenging the statewide plan, with political participation in Fort Worth prior to redistricting resembling what was possible in Laredo afterward. That observation underlies the disposition of both the Laredo and Fort Worth claims, and propels *LULAC*’s redefinition of racial vote dilution. It also suggests that, far from a distraction, the Section 2 claims in *LULAC* may ultimately be the source of a means to manage partisan gerrymandering. More workable than the one the plaintiffs presented in either *Vieth* or *LULAC*, this approach insists on a vibrant political process as opposed to securing an “equitable” outcome.

Justice Kennedy deemed the effort to insulate Representative Bonilla flawed because it was meant “to benefit the officeholder, not the voters,” and he thought what had been going on in Fort Worth prior to 2003 was no different. This distinction between benefits to voters and those to officeholders is underdeveloped, but the suggestion seems to be that incumbency protection should promote responsiveness rather than stifle competition. That is an intriguing idea. Voters should be able to re-elect representatives who serve them well, and Justice Kennedy rightly appreciated that Texas was up to something else when it split Laredo in 2003.

¹¹⁰ *Colegrove v. Green*, 328 U.S. 549 (1946).

In future cases, the Court may seek to operationalize this distinction between good and bad forms of incumbency protection, and better explain how we might identify when these efforts benefit voters, as opposed to officeholders. I would welcome such an effort. Still, I think an approach easier to administer and more robust in effect would be to return to the rule set forth in *Karcher v. Daggett*—the often-cited source of the mantra that incumbency protection is a legitimate districting goal. *Karcher* itself condoned not the protection of incumbents writ large, but instead a far more restricted desire to draw district lines so as to avoid contests between incumbents.

IV. CONCLUSION

The New York Times published an editorial the day after the Court decided *LULAC v. Perry* complaining that the Justices “did little to ensure the vibrancy of American democracy” and, while the Court “rightly” struck down the Laredo district, it “did not begin to address the serious problems with the 2003 redistricting.”¹¹¹ I think that is wrong. Striking down the statewide gerrymander because it purportedly gave Republicans too many safe seats would have done nothing to make Texan or American democracy more “vibrant.” Indeed, the Democratic plaintiffs did not seek vibrancy, but instead, a greater share of the districting spoils. Striking down the Laredo district, by contrast, on the grounds that the Court did was indeed an important step, one that may well begin to address the excesses of partisanship in the political process.

¹¹¹ Editorial, *A Loss for Competitive Elections*, N.Y. TIMES, June 29, 2006, at A24.